Tan Choon Moi v Industrial Court Malaysia & Anor

HIGH COURT (SANDAKAN) — APPLICATION FOR JUDICIAL REVIEW NO SDK-13–1/2 OF 2019
CELESTINA STUEL GALID J
30 DECEMBER 2019

Civil Procedure — Judicial review — Certiorari — Industrial Court dismissed applicant's claim against second respondent for dismissal without just cause or excuse — Whether Industrial Court committed error of law when it decided that dismissal of applicant was with just cause and excuse when the alleged misconduct was committed against second respondent's sister company and not second respondent itself — Whether the misconduct was established — Whether the proven misconduct constituted just cause and excuse for dismissal

Labour Law — Employment — Dismissal — Industrial Court dismissed applicant's claim against second respondent for dismissal without just cause or excuse — Whether Industrial Court committed error of law when it decided that dismissal of applicant was with just cause and excuse when the alleged misconduct was committed against second respondent's sister company and not second respondent itself — Whether the misconduct was established — Whether the proven misconduct constituted just cause and excuse for dismissal

The applicant was an employee of Sapatanian Sdn Bhd ('the second respondent') until her service was terminated on 30 September 2015 by the second respondent. The applicant claimed that she was also an employee of the second respondent's sister company known as Sri Istisafa Sdn Bhd ('Sri Istisafa'). The applicant's service was terminated based on the following allegations of misconduct: (a) dishonestly and/or unlawfully received salary from Sri Istisafa; and (b) the applicant had aided and/or abetted and/or colluded and/or acted in concert with her husband to siphon off monies from Sri Istisafa by allowing and/or permitting him to make the applicant a fictitious employee of Sri Istisafa and thereafter collected and/or kept the salary paid by Sri Istisafa. The applicant brought an action in the Industrial Court ('the first respondent') against the second respondent for dismissal without just cause or excuse but the first respondent dismissed the applicant's action ('the decision'). Aggrieved by the decision, the applicant brought the present judicial review application, inter alia, for certiorari to quash the decision. The issues for consideration were: (a) whether the first respondent committed an error of law when it decided that the termination of the applicant's employment by the second respondent was with just cause and excuse when the alleged acts of misconduct were allegedly committed against Sri Istisafa and not the second

respondent; (b) whether the misconduct was established; and (c) whether the proven misconduct constituted just cause and excuse for dismissal.

Held, allowing the applicant's claim, quashing the decision, and disallowing claim for punitive compensation with costs of RM3,000 be paid by the second respondent to the applicant subject to allocatur:

(1) Although the matter before the court was also concerning industrial relations dispute, the court did not find *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 ('the case') of any assistance to the second respondent's case at all because, it was one thing to promote justice to the employee, it was totally another to afford an avenue for another company (albeit related), a ground to terminate its employee's services. In other words, the court did not find anything in the ratio of the case to support the proposition that a related company could likewise acquire the right or standing to dismiss an employee on the ground of misconduct allegedly committed in a related company, whether subsidiary or a sister company. Based on the above, it was sufficient for the court to conclude that the first respondent had committed an error of law in deciding that the second respondent was entitled to terminate the applicant's employment with it on account of the alleged misconduct against Sri Istisafa (see paras 32–33).

(2) There was no finding of applicant having breached any term of her employment and/or having defrauded the second respondent (as pleaded) or of the applicant having lost the trust for her to continue with her employment in the second respondent. Given the lack of explanation by the first respondent, this court was therefore constrained to find that the first respondent had committed an error of law and/or was irrational in concluding the way that it did (see paras 38 & 40).

(3) It was trite law that the decision of the Industrial Court was susceptible to judicial review on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and possibly 'proportionality' under which the courts were clothed with powers to scrutinise the decision not only for process but also for substance (see para 41).

[Bahasa Malaysia summary

Pemohon adalah pekerja Sapatanian Sdn Bhd ('responden kedua') sehingga perkhidmatannya ditamatkan pada 30 September 2015 oleh responden kedua. Pemohon mendakwa bahawa dia juga pekerja syarikat adik responden kedua yang dikenali sebagai Sri Istisafa Sdn Bhd ('Sri Istisafa'). Perkhidmatan pemohon ditamatkan berdasarkan tuduhan salah laku berikut: (a) tidak jujur dan/atau menerima gaji dari Sri Istisafa secara tidak sah; dan (b) pemohon telah membantu dan/atau bersubahat dan/atau berkolusi dan/atau bertindak bersama dengan suaminya untuk menyalahgunakan wang dari Sri Istisafa

dengan membenarkan dan/atau mengizinkannya untuk menjadikan pemohon sebagai pekerja palsu di Sri Istisafa dan selepas itu mengumpulkan dan/atau menyimpan gaji yang dibayar oleh Sri Istisafa. Pemohon memfailkan tindakan di Mahkamah Perusahaan ('responden pertama') terhadap responden kedua kerana diberhentikan tanpa sebab atau alasan yang munasabah tetapi responden pertama menolak tindakan pemohon ('keputusan'). Terkilan dengan keputusan tersebut, pemohon memfailkan permohonan semakan kehakiman semasa, antara lain, untuk certiorari untuk membatalkan keputusan tersebut. Isu-isu yang perlu dipertimbangkan adalah: (a) sama ada responden pertama melakukan kekhilafan undang-undang apabila memutuskan bahawa pemberhentian pekerjaan pemohon oleh responden kedua adalah dengan sebab dan alasan yang munasabah apabila dakwaan perbuatan salah laku yang didakwa dilakukan terhadap Sri Istisafa dan bukan responden kedua; (b) sama ada salah laku telah dibuktikan; dan (c) sama ada salah laku yang terbukti merupakan sebab dan alasan yang munasabah untuk pembuangan kerja.

Diputuskan, membenarkan tuntutan pemohon, mengenepikan keputusan tersebut, dan menolak tuntutan ganti rugi punitif dengan kos sebanyak RM3,000 dibayar oleh responden kedua kepada pemohon tertakluk kepada alokatur:

(1) Walaupun perkara di hadapan mahkamah juga berkaitan dengan perselisihan hubungan industri, mahkamah mendapati bahawa *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109 ('kes tersebut') tidak menyokong kes responden kedua sama sekali kerana, adalah satu perkara untuk memberikan keadilan kepada pekerja dan satu perkara yang lain untuk memberi peluang kepada syarikat lain (walaupun berkaitan), alasan untuk menghentikan perkhidmatan pekerjanya. Dengan kata lain, mahkamah tidak mendapati apa-apa dalam ratio kes tersebut untuk menyokong cadangan bahawa syarikat berkaitan juga boleh memperoleh hak atau kedudukan untuk memberhentikan pekerja atas alasan salah laku yang didakwa dilakukan di syarikat berkaitan, sama ada anak syarikat atau syarikat adik. Berdasarkan perkara di atas, cukup untuk mahkamah menyimpulkan bahawa responden pertama telah melakukan kekhilafan undang-undang dalam memutuskan bahawa responden kedua berhak untuk menghentikan pekerjaan pemohon dengannya atas dakwaan salah laku terhadap Sri Istisafa (lihat perenggan 32–33).

(2) Tidak ada dapatan bahawa pemohon melanggar terma pekerjaannya dan/atau telah menipu responden kedua (seperti yang diplid) atau telah hilang kepercayaan ke atas pemohon untuk terus bekerja di responden kedua. Memandangkan tiada penjelasan oleh responden pertama, maka

mahkamah terpaksa membuat dapatan bahawa responden pertama telah melakukan kekhilafan undang-undang dan/atau tidak rasional dalam membuat keputusan seperti yang telah dilakukannya (lihat perenggan 38 & 40).

(3) Telah menjadi undang-undang yang mantap bahawa keputusan Mahkamah Perusahaan adalah rentan kepada semakan kehakiman atas alasan 'illegality', 'irrationality', 'procedural impropriety' dan mungkin juga 'proportionality' di mana mahkamah diberikan kuasa untuk memeriksa keputusan tersebut bukan hanya pada proses malahan juga kandungannya (lihat perenggan 41).]

Cases referred to

Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor [2004] 7 MLJ 441; [2004] 7 CLJ 77, HC (refd)

Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1980] 1 MLJ 109; [1979] 1 LNS 32 (distd)

Mackt Logistics (M) Sdn Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518; [2014] 5 CLJ 851, CA (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Rajathurai a/l Suppiah v Starship Agencies Sdn Bhd [2015] MLJU 798, HC (refd)

Legislation referred to

Industrial Relations Act 1967 s 29(a)

Gabriel Ho (Gabriel Ho & Co) for the applicant.
Chieng Ho Ming (Daryl Wong with him) (Chieng & Blasius) for the respondent.

Celestina Stuel Galid J:

INTRODUCTION

The decision

[1] By an Award No 2910/2018 dated 13 November 2018 ('the decision'), the learned Industrial Court Chairman ('the learned ICC') dismissed the applicant's claim for dismissal without just cause or excuse against the second respondent under the Case No 17/4–1083/16.

The parties

[2] The applicant was from 1 February 2012 an employee of the second respondent company until her services were suspended vide a letter dated 14 August 2015 and subsequently terminated vide a letter dated 30 September 2015.

[3] The applicant claimed to have also been employed by Sri Istisafa Sdn Bhd ('Sri Istisafa') from March 2009 until October 2014. However, her status as an employee of Sri Istisafa was disputed by the second respondent. The issue regarding the applicant's employment or otherwise with Sri Istisafa formed the heart of the applicant's dismissal from the second respondent's employment. The second respondent claimed that Sri Istisafa was a related or sister company of the second respondent at the material time.

The leave application

[4] The applicant's ex parte notice of application dated 13 February 2019 was heard by this court on 23 May 2019 and there being no objection from the Federal Counsel for the Attorney General of Malaysia, leave was granted on the date thereof.

THE APPLICANT'S DISMISSAL

[5] By a letter dated 14 August 2015, the second respondent gave a notice of inquiry to the applicant on the following allegations of misconduct:

> 1. Having full knowledge that you are not an employee of the Company's sister company, Sri Istisafa Sdn Bhd (Company No 371723-A), you have dishonestly and/or unlawfully received salary amounting to approximately RM199,000.00 (excluding employer's contributions towards Employees Provident Fund) between year 2009 to 2014 from Sri Istafa Sdn Bhd; and/or
>
> 2. You have aided and/or abetted and/or colluded and/or acted in concert together with your husband, Mr Yap Kok Chon to siphon off monies from Sri Istisafa Sdn Bhd by allowing and/or permitting him to made (sic) you a fictitious employee of Sri Istisafa Sdn Bhd and thereafter collected and/or kept the salary paid by Sri Istisafa Sdn Bhd to pay salary to you from 2009 to 2014 totaling (sic) approximately RM199,000.00 (excluding employer's contributions towards Employees Provident Fund).

[6] After a domestic inquiry held on 28 August 2015, the second respondent informed the applicant vide a letter dated 30 September 2015 that she had been found guilty of the charges levied against her and terminated her services with the second respondent with immediate effect and that her outstanding salary was to be deducted against the sum allegedly taken by the applicant as laid out in the charges against her.

THE DECISION

[7] Before proceeding further and guided by the case of *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* [2004] 7 MLJ 441; [2004] 7 CLJ 77, the learned ICC first determined whether the domestic inquiry ('DI') had been validly conducted. As there were no notes or minutes of the DI recorded in verbatim, the learned ICC held that the DI was 'flawed' and proceeded to hear the witnesses from both sides to determine whether the dismissal was with just cause or excuse.

[8] The applicant testified on her own behalf whereas the second respondent called three witnesses.

[9] The learned ICC had forefront in his mind the issue of whether the applicant was an employee of Sri Istisafa. This, after noting that there was no dispute that the applicant was paid the sums of RM199,000 and RM63,535.25 as salaries and overtime payment respectively throughout the applicant's alleged employment with Sri Istisafa from March 2009 until October 2014.

[10] Having heard the witnesses from both sides, the learned ICC accepted the evidence by the second respondent's witnesses that the applicant had not worked or did any work for Sri Istisafa although she was listed as the company's accounts clerk. The learned ICC also opined that whatever tasks the applicant had purportedly performed for Sri Istisafa, they were not those of an accounts clerk.

[11] It was part of the applicant's contention before the Industrial Court that the panel for the DI had erred in finding the applicant guilty as it was dealing with charges in relation to a separate company (ie Sri Istisafa). To this, the learned ICC accepted the evidence by the second respondent that Sri Istisafa and the respondent were related companies, having the same holding company (ie Sit Seng & Sons) with the same directors, forming part of the group (of companies) known as Aikbee Group of Companies. The second respondent and Sri Istisafa even shared the same office.

[12] The learned ICC concluded that the second respondent's termination of the applicant was with just cause and excuse.

THE SUBSTANTIVE APPLICATION FOR JUDICIAL REVIEW

[13] The applicant sought for the following reliefs in this application:

(a) that leave be granted to the applicant to apply for an order of certiorari directed to the first respondent to remove into this court and quash the decision or award of the first respondent dated 13 November 2018 in dismissing the applicant's claim of unfair dismissal without just cause or excuse against Sapatanian Sdn Bhd, the second respondent in the Industrial Court Case No 17/4–1083 of 2016;

(b) that the applicant's claim of unfair dismissal against the second respondent and all the prayers as prayed for in the applicant's statement of case in the Industrial Court Case No 17/4–1083 of 2016 be allowed;

(c) that the costs of the application be costs in the cause; and

(d) such further order or relief as the court shall deem fit and proper.

[14] The applicant relied on the following grounds in this application (verbatim):

(a) In arriving at the said decision, the Learned Chairman of the first Respondent had committed an error of law and/or that the said decision is irrational or had been arrived at in an unfair manner when the learned Chairman held that:

> Thus, based on the totality of the evidence adduced before me both through oral testimony as well as documentary evidence and bearing in mind s 30(5) of the IRA 1967 to act according to equity and good conscience and the substantial merits of this case, this Court finds that the Company has proven on a balance of probabilities those grounds for which the Claimant was terminated. Accordingly, this Court holds that the dismissal of the Claimant by the Company was with just cause or excuse and his claim is hereby dismissed.

(b) The said decision of the Learned Chairman of the first Respondent is irrational as he had indiscriminately accepted the evidence of COW3 that the Claimant's husband and his nephew were only nominees of the so-called Sit Seng/Aikbee Group of Companies that they lacked the financial capabilities of running Sri Istisafa Sdn Bhd and that the funding and financial resources for Sri Istisafa Sdn Bhd came from Sit Seng Realty & Sons Sdn Bhd when:

(i) Sri Istisafa Sdn Bhd was not a related company at all material times and only in 2013 Sit Seng Realty and Sons Sdn Bhd became a shareholder of Sri Istisafa Sdn Bhd;

(ii) There were no supporting documents in any audited accounts report of the Company that prior to 2013 Yap Kok Chon and Yap Chye Fatt are appointees made by the so-called group of companies but in fact the evidence adduced show that they were the owners and the shareholders of the Company and were paid valuable consideration for the sale of the shares in Sri Istisafa Sdn Bhd in 2013;

(iii) COW3 was not even a director in Sri Istisafa Sdn Bhd; and

(iv) He failed to appreciate or consider the evidence of the various company documents of Sri Istisafa Sdn Bhd in the Claimant's Further Bundle of Documents, exhibit TCM-11.

(c) The said decision of the Learned Chairman is unlawful, irrational and/or has been arrived at in an unfair manner in making a finding that the dismissal of the Claimant was with just cause and excuse when the Company was dealing with alleged charges of misconduct by the Claimant in a separate company Sri Istisafa Sdn Bhd regarding her employment in the latter back in 2009, and who had stopped working in Sri Istisafa Sdn Bhd in October 2014 when the new management of the Company even revised her salary upwards as a driver in the Company to RM2,000.00 gross per month in December 2014, without giving her any assignments or work to do.

(d) The said decision of the Learned Chairman of the first Respondent is unlawful, irrational and/or has been arrived at in an unfair manner when after holding that the domestic inquiry ('DI') was flawed and the findings of the DI could not be relied on, however failed to appreciate or sufficiently appreciate that the Applicant's letter of termination of employment arose from the DI.

THIS COURT'S DECISION

The parties' main contention

[15] Based on the grounds relied on by the applicant and the submissions from both parties herein, the main issue before this court was:

> Whether the Industrial Court committed an error of law when it decided as it did that the termination of the Applicant's employment by the second Respondent was with just cause and excuse when the alleged acts of misconduct charged against the Applicant were allegedly committed against Sri Istisafa and not the second Respondent?

[16] There was no dispute that the charges levelled against the applicant were for alleged misconduct against Sri Istisafa, not the second respondent — see [5] above.

[17] The core of the second respondent's submission to contend that the Industrial Court did not commit an error of law was that the second respondent and Sri Istisafa were related or sister companies.

[18] In submission, learned counsel for the second respondent cited the case of *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1980] 1 MLJ 109; [1979] 1 LNS 32.

[19] As *Hotel Jaya Puri* was the sole authority cited by the learned counsel for the second respondent on this issue (the other case, *Mackt Logistics (M) Sdn*

Bhd v Malaysian Airline System Bhd [2014] 2 MLJ 518; [2014] 5 CLJ 851 merely cited *Hotel Jaya Puri* with approval), it will be useful to consider the facts of the case.

[20] *Hotel Jaya Puri* was a decision in respect of a judicial review application for certiorari against the decision by the Industrial Court ordering Hotel Jaya Puri Bhd ('the hotel') to pay compensation of two months salaries plus fixed allowances in favour of workmen employed in the business of Jaya Puri Chinese Garden Restaurant Sdn Bhd ('the restaurant').

[21] The restaurant which was a fully owned subsidiary of the hotel had 56 workers employed in the business of the restaurant. The business of the restaurant was carried on at the hotel's premises which was rented to the restaurant. Subsequently, the restaurant closed its business due to financial losses and the services of the 56 employees (who were members of the trade union) were terminated. Following this, a dispute arose which was later referred to the Industrial Court.

[22] The Industrial Court, inter alia, found that the hotel was in fact the employer of the workers and ordered it to pay compensation. The hotel sought to quash the award but the application was dismissed. In so doing, the High Court held that a court is willing to lift the corporate veil 'when the justice of the case so demands'.

[23] Salleh Abas FJ (as His Lordship then was) went on to state as follows:

> It is clear therefore that the approach taken by the President of Industrial Court is not without any legal support when he placed an emphasis on the essential unity of group enterprise which in this case consists of the hotel and the restaurant, especially when Datuk NA Kularajah who is the Managing Director of the hotel was also the Managing Director and later a Director of the restaurant and had the ultimate authority over the employees. Thus, the practice of treating the employees of the restaurant as being separate from the employees of the hotel such as the union having been told that they were so, their salaries, their EPF and SOCSO contributions being paid by the restaurant, does not detract from the fact that the employees in question were in fact working in one group enterprise. In my judgment, by giving recognition to this fact, the President did not cause any violence to the sanctity of the principle of separate entity established in *Salomon v Salomon & Co* but rather gave effect to the reality of the hotel and the restaurant as being in one enterprise. I find nothing unreasonable in the finding of the President by by-passing this principle. He did no more than to comply with the wishes of the legislature that in the making of an award substantial merits of the case, the public interest and any matters which are necessary or expedient for the purpose of settling the dispute are among the factors which should be taken into consideration by the court. In my view, the finding by the President is in no way against the principle of

separate entity and I am therefore not prepared to interfere with the award on this account.

[24] The reasoning by the learned President of the Industrial Court in concluding that the hotel was the employer of the workers in that case can be amply seen in the following excerpts from the award:

> Encik Palasuntharam cited a number of authorities on company law and the separate legal entity of a subsidiary. While this may be the position under company law or at common law, the claim of the union is founded under the provision of the Act and the authorities cited are not strictly relevant. *The essence of the union's case is that though the restaurant is a separate legal entity under company law, the real employer is the hotel if one takes into consideration the whole of the oral and documentary evidence before the court.* The court has to place greater emphasis on equity and good conscience than on legalistic principles when determining the questions relating to unfair labour practices. (Emphasis added.)

[25] The learned President of the Industrial Court then made a number of findings as follows:

(1) The hotel and the restaurant were inter-dependent;

(2) There was a functional integrity and unity of establishment between the hotel and the restaurant. In other words, functionality the hotel and the restaurant are in fact one integral whole and management-wise they also constitute a single unit. Dato' NA Kularajah who is the Managing Director for both the hotel and the restaurant, although later he became only the Director of the hotel, 'had the ultimate authority over the employees working for the restaurant;

(3) A number of senior officers such as the Secretary, Personnel Manager and Assistant Manager were common to both the hotel and the restaurant; and

(4) 32 employees whose letters of appointment are those in bundles A and B were appointed by the hotel although eight employees whose letters of appointment are in bundle C were appointed by the restaurant.

[26] When juxtaposition with the facts of the present case, a foremost distinguishing factor in *Hotel Jaya Puri* is that the learned President of the Industrial Court had, pursuant to s 29(a) of the Industrial Relations Act 1967 ('the Act'), ordered the hotel to be added as a party before proceeding to hear the merits of the case. In the present case, Sri Istisafa was never made a party to the proceedings.

[27] Another distinguishing factor is that the second respondent's case had always been that the applicant was never a (legitimate) employee of Sri Istisafa. The learned ICC agreed with the second respondent on this, making a positive finding that '... the court therefore conclude that she was never work as an

accounts clerk for the company (sic) and that her position as accounts clerk was fictitious'. This is to be distinguished from the findings of the Industrial Court in *Hotel Jaya Puri* that the employees of the restaurant were in effect employees of the hotel.

[28] Thirdly, the court in *Hotel Jaya Puri* accepted the Industrial Court's emphasis on 'the essential unity of group enterprise' as being the basis and support for the lifting of the corporate veil in that case. However, this court respectfully noted that there was no such consideration and/or finding by the learned ICC in the present case.

[29] There have been observations made by the courts as to the limited extent of the application of the ratio in *Hotel Jaya Puri*.

[30] For instance, Lee Swee Seng J (as His Lordship then was) stated as follows in *Rajathurai a/l Suppiah v Starship Agencies Sdn Bhd* [2015] MLJU 798:

> Cases of this nature would be facts-centric. Courts are anxious to see that justice is done for employee who has no control over the internal arrangement for payments of his salary but who understands and indeed is expected to serve the various companies in the group.

[31] This was echoed by Justice S Nantha Balan (as His Lordship then was) in the illuminating article, *Lifting of the Corporate Veil*, January [2018] MLJ 57. Commenting on *Hotel Jaya Puri*, His Lordship stated as follows:

> ... it is questionable whether *Hotel Jayapuri* can be relied upon as a binding and authoritative precedent beyond the peculiar fact pattern in that case. This is because of the reliance by Salleh Abas FJ in *Hotel Jayapuri* to that passage from the 3rd edn of *Gower*. In the *Bolex* case, the Court of Appeal referred to the 7th edn of *Gower*'s textbook and pointed out that the current authors of that eminent text no longer hold that view in line with the decision of the Court of Appeal in *Adams v Cape*.
>
> [23] As such, on that premise, *it may be possible to argue that the 'functional integrality' test in Hotel Jayapuri cannot be relied upon beyond the very limited area that it purported to cover*. The ramifications of applying *Hotel Jayapuri* across the board would necessarily mean in effect that the doctrine of separate legal personality is cast obsolete. It is also crucial to observe that the functionality integrality principle as espoused in the *Hotel Jayapuri* case is the same as that of the single economic test which in turn has been well and truly discarded by the Malaysian courts as seen in the *Boltex* case as well as by the English courts in the cases of *Woolfson* and *Adams v Cape*. But, it is imperative to note that the case was an industrial relations case and the pronouncement should be confined to the realm of industrial relations where statutes are given benevolent interpretations in order to achieve social justice so that the workmen are not adversely affected by strict interpretations of legislation and principles of law. *Hotel Jayapuri* itself recognises the need for this benevolent

A interpretation. *In any event, it bears repeating that the principle of 'functional integrality' as arrived at in the Hotel Jayapuri case was jettisoned by the Court of Appeal in the Boltex case. The justice of the case principle has also been firmly repudiated in the Boltex case*. (Emphasis added.)

B **[32]** On my part and although the matter before me was also concerning industrial relations dispute, I did not find *Hotel Jaya Puri* of any assistance to the second respondent's case at all. For it is one thing to promote justice to the employee, it is totally another to afford an avenue for another company (albeit related), a ground to terminate its employee's services. To say it another way, I C did not find anything in the ratio in *Hotel Jaya Puri* to support the proposition that a related company could likewise acquire the right or standing to dismiss an employee on the ground of misconduct allegedly committed in a related company, whether subsidiary or a sister company. It would have been different had the terms of employment of the applicant with the second respondent D allowed for such dismissal on the said ground, but that was never canvassed before the Industrial Court.

Other issue(s)

E **[33]** Based on [15]–[32] above, it was sufficient for this court to conclude that the learned ICC had committed an error of law in deciding that the second respondent was entitled to terminate the applicant's employment with it on account of the alleged misconduct against Sri Istisafa.

F **[34]** However, for completeness, this court had also considered whether the Industrial Court had correctly applied its twofold function as propounded by the Federal Court in *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537, that is, to first determine whether the misconduct complained of by the G employer has been established, and secondly, whether the proven misconduct constitutes just cause and excuse for dismissal.

[35] In para 16(a) of its statement of reply, the second respondent had averred as follows:

H The doctrine of unfair and/or wrongful dismissal on 30.09.2015 and/or constructive dismissal prior to 15.07.2015 is not applicable to the facts of the present case as the dismissal of the Claimant as the driver of the Company was justified and was made with lawful cause and just reason. The new board of directors of the Company had acted bona fide and had properly caused to hold a domestic I enquiry in respect of the charges of misconduct levied against the Claimant *as the Claimant had breached the terms of her contract of employment and had maliciously conducted herself in a manner which was calculated to defraud the Company* in that the Claimant had between a period from March 2009 to October 2014 unlawfully received salary from the Company's sister Company (Sri Istisafa Sdn Bhd) amounting to RM199,000.00 and had illegally caused Sri Istisafa Sdn Bhd to make

payment of the total sum of RM24,810.00 being the total sum of contribution wrongfully made by Sri Istisafa Sdn Bhd towards the account of the Claimant with Employees Provident Fund. (Emphasis added.)

[36] However, the allegation that there was breach of contract or fraud on the part of the applicant never formed part of the charges levied against the applicant — see [5] above. In fact, during the hearing, COW3, who was the Aikbee Group Finance Director, did not even refer to any alleged breach of contract and/or fraud but justified the termination by stating that (see Q&A 9 of the witness statement):

... The panel found the misconduct in Sri Istisafa by Tan Choon Moi (in collusion with her husband) was serious and it warranted her dismissal from Sapatanian Sdn Bhd. *It made sense as both Sri Istisafa and Sapatanian are sister/related companies under the same group and sharing the same office. Tan Choon Moi was no longer trustable as an employee of Sapatanian. It would have been absurd to allow Tan Choon Moi to continue working under Sapatanian in light of the serious misconduct/lack of integrity by her in the sister company Sri Istisafa*. (Emphasis added.)

[37] Bearing in mind that this was not a run-of-the-mill situation where the alleged misconduct was committed against the company itself, to my mind, it was all the more compelling for the learned ICC to explain his findings of the appellant's alleged misconduct as against the second respondent. This was especially so as shown above, the second respondent's pleaded case differed from the evidence led by its witnesses and/or the charges levied against the applicant.

[38] With the greatest of respect, the learned ICC had stopped short of addressing as to whether and/or how the court's findings ie that the applicant was not an employee of Sri Istisafa amounted to misconduct in relation to the second respondent. There was no finding of either the applicant having breached any term of her employment and/or having defrauded the second respondent (as pleaded) or of the applicant having lost the trust for her to continue with her employment in the second respondent (as testified by COW3).

[39] In *Milan Auto*, the Federal Court had held that the failure to determine whether the misconduct had been established and whether the proven misconduct constituted just cause and excuse for the dismissal on the merits would be a jurisdictional error meriting interference by certiorari by the High Court.

[40] Given the lack of explanation by the Industrial Court, this court was therefore constrained to find that the court had committed an error of law and/or was irrational in concluding the way that it did.

[41] It is trite law that the decision of the Industrial Court is susceptible to judicial review on the grounds of 'illegality', 'irrationality', 'procedural impropriety' and possibly 'proportionality' under which the courts are clothed with powers to scrutinise the decision not only for process but also for substance — see *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

CONCLUSION

[42] For all of the above reasons, I found merits in the application. I therefore allowed the applicant's claim and quashed the decision and ordered as follows:

(a) that the applicant's claim of unfair dismissal against the second respondent and prayers (i) and (ii) of the applicant's statement of case dated 1 October 2016 in the Industrial Court Case No 17/4–1083/16 be allowed; and

(b) that costs of RM3,000 be paid by the second respondent to the applicant subject to allocatur.

[43] The claim for punitive compensation under prayer (iii) was not made out and hence, disallowed.

Applicant's claim allowed; decision quashed; claim for punitive compensation disallowed with costs of RM3,000 be paid by second respondent to applicant subject to allocatur.

Reported by Dzulqarnain bin Ab Fatar